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4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**

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7 UNITED STATES OF AMERICA,  
8 Plaintiff,  
9 v.  
10 BRIAN FLOYD,  
11 Defendant.

Case No. 2:17-cr-00404-RFB-VCF

**ORDER**

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14 Defendant Brian Floyd moves the Court to vacate, set aside, or correct his sentence (ECF  
15 No. 141) on the basis that aiding and abetting a Hobbs Act robbery does not qualify as a “crime of  
16 violence” under 18 U.S.C. § 924(c). For the reasons below, his motion is denied.

17 **I. FACTUAL AND PROCEEDURAL BACKGROUND**

18 On May 4, 2018, Mr. Floyd pleaded guilty to aiding and abetting carjacking (Count 1),  
19 aiding and abetting Hobbs Act robbery (Count 2), and aiding and abetting the brandishing of a  
20 firearm during and in relation to a crime of violence, namely Count 2 (Count 3). ECF Nos. 89, 91,  
21 92. On September 13, 2018, the Court sentenced Mr. Floyd to concurrent sentences of three  
22 months’ imprisonment for Counts 1 and 2 and a consecutive sentence of seven years for Count 3.  
23 ECF Nos. 118, 120. The Court also sentenced Mr. Floyd to supervised release for three years on  
24 Counts 1 and 2 and five years on Count 3. ECF No. 120.

25 Following the Supreme Court’s decision in United States v. Davis, 139 S. Ct. 2319 (2019)  
26 (holding the § 924(c) residual clause is unconstitutionally vague), on June 23, 2020, Mr. Floyd  
27 timely filed a 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence relying on Davis.  
28 ECF No. 141. The motion was fully briefed. ECF Nos. 153, 157. On September 16, 2020, the

1 United States filed a Motion for leave to file a sur-reply, which the Court granted on September  
 2 29, 2020. ECF Nos. 161, 165. Mr. Floyd Responded to the sur-reply on September 30, 2020. ECF  
 3 No. 169. On April 27, 2021, the United States filed a Motion for Leave to Advise the Court of new  
 4 authorities. ECF No. 170. On May 5, 2021, the Court granted the United States Motion for Leave  
 5 to Advise and set a hearing for the Motion to Vacate. ECF No. 177. Mr. Floyd Responded to the  
 6 United States' Motion for Leave to Advise on May 11, 2021. ECF No. 184. On May 19, 2021, the  
 7 Court vacated the hearing and deferred ruling on the Motion to Vacate. ECF No. 188.  
 8 Subsequently, both Mr. Floyd and the United States have kept the Court appraised of developments  
 9 in the caselaw post-Davis. ECF Nos. 193, 215, 219, 220, 221, 223, 226.

## 10 **II. LEGAL STANDARD**

11 Under 28 U.S.C. § 2255, a petitioner may file a motion requesting the court which imposed  
 12 sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). Such a motion may be  
 13 brought on the following grounds: “(1) the sentence was imposed in violation of the Constitution  
 14 or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the  
 15 sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject  
 16 to collateral attack.” Id.; see United States v. Berry, 624 F.3d 1031, 1038 (9th Cir. 2010). When a  
 17 petitioner seeks relief pursuant to a right newly recognized by a decision of the United States  
 18 Supreme Court, a one-year statute of limitations applies. 28 U.S.C. § 2255(f)(3). That one-year  
 19 limitation begins to run from “the date on which the right asserted was initially recognized by the  
 20 Supreme Court.” Id.

## 21 **III. DISCUSSION**

22 The Court finds that there are no grounds to grant § 2255 relief.

23 Section 924(c), under which Mr. Floyd was convicted, prohibits the use of a firearm  
 24 “during and in relations to any crime of violence.” 18 U.S.C. § 924(c)(1)(A). Following the  
 25 Supreme Court’s ruling in Davis, a felony qualifies as a crime of violence only if it “has as an  
 26 element the use, attempted use, or threatened use of physical force against the person or property  
 27 of another.” 18 U.S.C. § 924(c)(3)(A); see also Davis, 139 S. Ct. 2319 (invalidating  
 28

1 18 U.S.C. § 924(c)(3)(B)).

2 The Hobbs Act, under which Mr. Floyd was convicted and which also supports his  
3 conviction under Count 3, criminalizes committing, attempting to commit, or conspiring to commit  
4 a robbery with an interstate component. 18 U.S.C. § 1951(a). Mr. Floyd was convicted under an  
5 aiding and abetting theory of criminal liability. Section 924(c) authorizes heightened sentences for  
6 those who use a firearm in connection with a “crime of violence.” 18 U.S.C. § 924(c). Mr. Floyd  
7 argues that, while Hobbs Act robbery is a crime of violence, he was convicted of aiding and  
8 abetting, which should not be considered a crime of violence.

9 The door to this argument opened with the Supreme Court’s decision in United States v.  
10 Davis, which presented the possibility that all or some forms of Hobbs Act robbery were not crimes  
11 of violence under § 924(c). 139 S. Ct. 2319. Following Davis, only federal felonies that have as  
12 an element the use, attempted use, or threatened use of force qualify for § 924(c).<sup>1</sup>  
13 18 U.S.C. § 924(c)(3)(A). In United States v. Taylor, the Supreme Court held that no element of  
14 attempted Hobbs Act robbery required proof of the defendant’s use, attempted use, or threat to use  
15 force. 142 S. Ct. 2015, 2020 (2022). Therefore, attempted Hobbs Act robbery was not a crime of  
16 violence and § 924(c) does not apply. Id. at 2021.

17 However, the Supreme Court and the Ninth Circuit recently closed that door to § 2255  
18 relief for those convicted of aiding and abetting Hobbs Act robbery. Following Taylor, the Ninth  
19 Circuit has held that while attempted Hobbs Act robbery is not a crime of violence, completed  
20 Hobbs Act robbery remains a crime of violence. United States v. Eckford, 77 F.4th 1228 (9th Cir.  
21 2023). Further, in Eckford, the Ninth Circuit also held that aiding and abetting a Hobbs Act robbery  
22 is a crime of violence. 77 F.4th at 1237. “One who aids and abets the commission of a violent  
23 offense has been convicted of the same elements as one who was convicted as a principal . . . .”  
24 Id. Therefore, aiding and abetting Hobbs Act robbery, like completed Hobbs Act robbery, is a  
25 crime of violence within the meaning of § 924(c). Id.; see also Young v. United States, 22 F.4th

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27 <sup>1</sup> Prior to Davis, it was settled law in this circuit that Hobbs Act robbery was a crime of  
28 violence under a different provision of § 924(c). See United States v. Mendez, 992 F.2d 1488,  
1491 (9th Cir. 1993) (holding that Hobbs Act robbery was a crime of violence under the residual  
clause); Davis, 139 S. Ct. at 2336 (invalidating the residual clause).

1 1115, 1122-23 (9th Cir. 2022) (“We therefore hold that, because armed bank robbery is  
2 categorically a crime of violence, a person who aids or abets armed bank robbery falls, like a  
3 principal, within the scope of the definition of the underlying offense and is deemed to have  
4 committed a crime of violence under § 924(c)’s elements clause.”).

5 Since aiding and abetting Hobbs Act robbery is a crime of violence, Mr. Floyd’s conviction  
6 under § 924(c) is sound.

#### 7 8 **IV. CERTIFICATE OF APPEALABILITY**

9 This is a final order adverse to the Petitioner Mr. Floyd. As such, Rule 11(a) of the Rules  
10 Governing Section 2255 Cases requires this Court to issue or deny a certificate of appealability  
11 (COA). See also 28 U.S.C. § 2253(c)(1)(B). Without a COA, Mr. Floyd “may not appeal that  
12 denial.” United States v. Washington, 653 F.3d 1057, 1059 (9th Cir. 2011). To issue a COA, the  
13 Court must find that Mr. Floyd “has made a substantial showing of the denial of a constitutional  
14 right.” 28 U.S.C. § 2253(c)(2). Under this standard, the Court looks for a showing that “reasonable  
15 jurists would find [this Court’s] assessment of the constitutional claims debatable or wrong.” Slack  
16 v. McDaniel, 529 U.S. 473, 484 (2000). Because the Court found that settled, binding caselaw  
17 disposes of Mr. Floyd’s claims, the Court finds that no reasonable jurist could find the Court’s  
18 assessment debatable or wrong.

#### 19 **V. CONCLUSION**

20 **IT IS THEREFORE ORDERED** that Defendant Brian Floyd’s Motion to Vacate, Set  
21 Aside, or Correct Sentence under 28 U.S.C. 2255 (ECF No. 141) is **DENIED**.

22 **IT IS FURTHER ORDERED** that Defendant Brian Floyd is **DENIED** a Certificate of  
23 Appealability.

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**IT IS FURTHER ORDERED** that the United States' Motion to Advise the Court (ECF No. 221) is **GRANTED**.

**DATED** this 4<sup>th</sup> day of December 2023.



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**RICHARD F. BOULWARE, II**  
**UNITED STATES DISTRICT JUDGE**